Saari bin Jusoh v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J–05–121 OF 1995

GOPAL SRI RAM, ZULKELFI AND SURIYADI JJCA
14 AUGUST 2006

Criminal Law — Dangerous drugs — Trafficking — Agreement to sell cannabis — Agent provocateur — Whether 'agreement to sell' or 'agreement to buy' fall within the definition of trafficking — Dangerous Drugs Act 1952 s 39B(1)(a)

Statutory Interpretation — Construction of statutes — Penal statute — Strict construction — Principles applicable

The appellant was charged, tried and convicted of the offence of trafficking in a dangerous drug under s 39B(1) of the Dangerous Drugs Act 1952 ('the Act'). According to the prosecution's case, PW7 acted as an agent provocateur to buy some drugs. Five meetings took place between PW7 and the appellant. At the first meeting PW7 was introduced to the appellant by an informer. At the second meeting some preliminary negotiations took place for the sale of cannabis by the appellant to PW7. At the third meeting an agreement was reached between the appellant and PW7 that the former would sell and the latter would purchase 4kg of cannabis for the sum of RM6,000. However, the appellant wanted PW7 to show him the RM6,000 before the drug could be delivered. At that fourth meeting PW7 showed the appellant the RM6,000. At the same meeting the place at which the drug was to be handed over was agreed upon. The fifth meeting took place at the designated meeting point at 11.45pm, where PW7 saw the appellant coming along on foot, carrying a plastic bag. The appellant went to a money changer's shop at which he placed the bag on the ground. He then went up to PW7 and asked him to go and pick up the bag. PW7 did so and returned to where the appellant was. PW7 then lit his cigarette lighter to check the contents of the bag. He found a substance which he suspected to be cannabis. Thereafter, PW7 lit his cigarette lighter once again. This was the pre-arranged signal. Upon seeing this, the police officers who were in the ambush party at the scene came up to the appellant and arrested him. The drug was seized. The learned trial judge found the appellant guilty on a joint application of the presumptions in s 37(d) and (da) of the Act. A conviction for trafficking based on those two presumptions is bad and must be quashed. The learned deputy however argues that despite this misdirection by the trial court the conviction should nevertheless be upheld as there is sufficient evidence on record to establish a case of actual trafficking under s 39B(1)(a) of the Act. The prosecution's case is that the appellant sold the drug in question to PW7 and thereby trafficked in it. Trafficking is an offence created by s 39B(1)(a) of the Act. The crucial question is whether on the facts there had been a sale of the proscribed drug by the appellant to PW7.

Held, quashing the conviction under s 39B(1) and substituting it with a conviction under s 12 read with s 39A(2) of the Act:

(1) The word 'selling' appears in a penal statute. It must therefore be given a strict construction (*Liew Sai Wah v Public Prosecutor* [1968] 2 MLJ 1; *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337; *Public Prosecutor v Chua Chor Kian* [1998] 1 MLJ 167). Applying the approach of strict construction, s 2 of the Act does not employ the expressions 'agreement to sell' or 'agreement to buy' to fall within the definition of trafficking. Accordingly, a mere agreement to buy or sell a proscribed drug is not an act of trafficking within s 39B(1)(a) of the Act. Neither do negotiations for a sale amount to the offence of trafficking within s 39B(1)(a). The transaction must have been completed. Anything short of this is insufficient on the instant facts as it would admit a more lenient; a more flexible; approach to the construction of a penal statute. Such a completed transaction did not take place in the present instance because the trap was sprung too early (see paras 6–10).

(2) A 'buying' transaction is not complete when an offer is made and accepted. In such a case, all that has happened is that an agreement to sell has been concluded. And that is something that the Act does not encompass in the s 2 definition of trafficking. The learned judge's approach in *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155, appears to place on the words in s 2 a broad, flexible and liberal interpretation. This is not in accordance with settled principles of construction (see para 13).

(3) The prosecution's case in *Namasiyiam v Public Prosecutor* [1987] 2 MLJ 336 was not that there had been a sale. It was simply not a case under s 39B(1)(a). It was a case under s 39B(1)(c). Hence, any comment by the trial judge in that case about a case having been made out under the former subsection was pure obiter. Also, the Supreme Court does not appear to have addressed its mind to the principle that the Act had to be strictly construed. In any event, in the light of the later decisions of the apex court, the obiter dicta in Namasiyiam must be treated with extreme caution and as being wholly limited to the facts of that case (see para 15).

(4) The prosecution's case in*Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 was one of supplying drugs and not selling them. So the observation about there having been a sale was pure obiter dicta. In any event, the approach to the construction of s 2 definition of trafficking appears to be broad, liberal and flexible: not strict (see para 17).

(5) The decision of the High Court at first instance in the case of *Public Prosecutor v Manoharan a/l Ratnasamy* [1989] 1 MLJ 504 is plainly wrong as the definition of 'trafficking' in the Act does not include mere negotiations. What the High Court had done in that case was to have read words into the definition of trafficking in the Act. This is clearly impermissible (see para 17); *Richardson v Bardenhagen Enterprise Pty Ltd* [1971] Tas SR 307 referred.

[Bahasa Malaysia summary

Perayu dituduh, dibicarakan dan disabitkan dengan kesalahan mengedar dadah berbahaya di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('Akta tersebut').

Mengikut kes pendakwa raya, PW7 telah bertindak sebagai seorang agent provocateur untuk membeli dadah. Lima mesyuarat telah diadakan di antara PW7 dan perayu. Pada mesyuarat pertama PW7 telah dikenalkan kepada perayu oleh seorang pemberi maklumat. Pada mesyuarat yang kedua, beberapa perundingan awal telah diadakan untuk menjualkan kanabis oleh perayu kepada PW7. Pada mesyuarat ketiga, satu persetujuan telah dicapai di antara perayu dan PW7 di mana perayu akan menjual dan PW7 akan membeli 4kg kanabis untuk jumlah RM6,000. Akan tetapi, perayu menghendaki PW7 menunjukkan kepadanya jumlah RM6,000 sebelum dadah tersebut dapat diserahkan. Pada mesyuarat yang keempat, PW7 menunjukkan wang RM6,000 kepada perayu. Pada mesyuarat yang sama juga, tempat di mana dadah tersebut akan diserahkan juga dipersetujui. Mesyuarat yang kelima ditetapkan pada jam 11.45 petang di tempat yang dipersetujui tersebut di mana PW7 nampak perayu berjalan kaki, memegang satu beg plastik. Perayu telah ke sebuah kedai penukar wang di mana beg yang diambilnya diletak di atas tanah. Beliau kemudiannya pergi ke PW7 dan menyuruhnya ke sana untuk mengambilkan beg tersebut. PW7 berbuat demikian dan kembali ke tempat di mana perayu berada. PW7 kemudiannya memetik pemetik apinya untuk memeriksa kandungan beg tersebut. Beliau telah menjumpai bahan yang dipercayainya ialah kanabis. Selepas itu PW7 memetik pemetik apinya sekali lagi. Ini merupakan isyarat yang telah dipersetujui. Melihat ini, pegawai-pegawai polis yang berada di dalam kumpulan pemerangkap di tempat tersebut telah pergi kepada perayu dan menangkapnya. Dadah tersebut dirampas. Hakim yang bijaksana telah mendapati perayu bersalah dengan menggunapakai anggapan di bawah s 37(d) dan (da) Akta tersebut. Sesuatu sabitan untuk pengedaran berdasarkan kedua-dua anggapan adalah salah dan patut dibatalkan. Akan tetapi, pendakwa raya yang bijaksana menghujahkan bahawa walaupun terdapat satu salah arah yang dilakukan oleh mahkamah perbicaraan, namun begitu sabitan patut dikekalkan oleh kerana terdapat bukti yang mencukupi di dalam rekod untuk membuktikan satu kes pengedaran sebenarnya di bawah s 39B(1)(a) Akta tersebut. Kes pendakwa raya ialah bahawa perayu menjualkan dadah tersebut kepada PW7 dan dengan itu mengedarkannya. Soal yang penting ialah sama ada berdasarkan fakta-fakta terdapat penjualan dadah yang diharamkan oleh perayu kepada PW7.

Diputuskan, membatalkan sabitan di bawah s 39B(1) dan menggantikannya dengan sabitan di bawah s 12 dibaca dengan s 39A(2) Akta tersebut:

(1) Perkataan 'menjual' kelihatan di undang-undang jenayah. Dengan ini, ia mestilah diberikan tafsiran yang ketat (*Liew Sai Wah v Public Prosecutor* [1968] 2 MLJ 1; *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337; *Public Prosecutor v Chua Chor Kian* [1998] 1 MLJ 167). Dengan memakai pendekatan tafsiran yang ketat, s 2 Akta tersebut tidak menggunakan perkataan-perkataan 'bersetuju untuk menjual' atau 'bersetuju untuk membeli' yang dapat memasukkannya ke bawah definisi pengedaran. Dengan itu, hanya persetujuan untuk menjual atau membeli dadah yang diharamkan itu bukannya satu tindakan pengedaran di bawah s 39B(1)(a) Akta tersebut. Perundingan untuk satu jualan juga tidak menjadikannya satu kesalahan pengedaran di bawah s 39B(1)(a). Transaksi tersebut mestilah diselesaikan. Sebarang yang lain adalah tidak mencukupi pada fakta-fakta di sini oleh kerana

ia akan membawa kepada pendekatan yang tidak ketat, lebih fleksibel dalam tafsiran undang-undang jenayah. Dalam kes ini, tiada penyelesaian transaksi tersebut oleh kerana perangkap dijerat terlalu awal (lihat perenggan 6–10).

(2) Satu transaksi 'membeli' adalah tidak selesai apabila tawaran dibuat dan diterima. Dalam kes sebegini, apa yang terjadi ialah satu perjanjian untuk dijual telah dimasuki. Ini adalah satu perkara di mana definisi pengedaran tidak diliputi di dalam s 2 Akta tersebut. Pendekatan hakim bijaksana dalam kes *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155, nampaknya mentafsirkan perkataan-perkataan di s 2 secara terbuka fleksibel dan liberal. Ini bukan mengikut prinsip-prinsip pentafsiran yang mantap (lihat perenggan 13).

(3) Kes pendakwa raya dalam *Namasiyiam v Public Prosecutor* [1987] 2 MLJ 336 bukannya terdapat satu jualan. Ia bukannya satu kes di bawah s 39B(1)(a). Ia merupakan satu kes di bawah s 39B(1)(c). Dengan itu, sebarang ulasan oleh hakim perbicaraan dalam kes tersebut berhubungan dengan satu kes yang telah dibuktikan di bawah subseksyen yang terdahulu adalah obiter. Mahkamah Agung nampaknya tidak menujukan fikirannya kepada prinsip bahawa Akta tersebut harus ditafsirkan dengan ketat. Walau bagaimanapun, memandangkan keputusan kes-kes selepas itu di mahkamah tertinggi, obiter dicta kes Namasiyiam mestilah dilayan secara berjaga-jaga dan kesemuanya terhad kepada fakta-fakta kes tersebut (lihat perenggan 15).

(4) Kes pendakwa raya dalam *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 adalah berhubungan dengan pembekalan dadah dan bukannya menjualkannya. Dengan itu pandangan bahawa terdapat jualan hanyalah obiter dicta. Walau bagaimanapun, pendekatan kepada tafsiran seksyen 2 definasi pengedaran nampaknya terbuka, liberal dan fleksibel: bukannya ketat (lihat perenggan 17).

(5) Keputusan Mahkamah Tinggi pada asalnya di dalam kes *Public Prosecutor v Manoharan a/l Ratnasamy* [1989] 1 MLJ 504 adalah salah dan definasi "pengedaran" di dalam Akta tersebut tidak meliputi perundingan semata-mata. Apa yang Mahkamah Tinggi telah lakukan dalam kes tersebut ialah membaca perkataan-perkataan ke dalam definasi pengedaran dalam Akta tersebut. Ini adalah dengan jelas tidak dibenarkan (lihat perenggan 17); *Richardson v Bardenhagen Enterprise Pty Ltd* [1971] Tas SR 307 dirujuk.]

Notes

For cases on drug trafficking, see 4 *Mallal's Digest*, (4th Ed, 2003 Reissue) paras 112–120.

For cases on penal statutes, see 4 *Mallal's Digest*, (4th Ed, 2003 Reissue) paras 1796–1814.

Cases referred to

Asdanusi Daut v PP [2004] 3 CLJ 669 (refd)
Chiu Wing Na v Ong Beng Cheng [1994] 1 MLJ 89 (refd)
Chow Kok Keong v PP [1998] 2 MLJ 337 (refd)
Liew Sai Wah v PP [1968] 2 MLJ 1 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)

A *Namasiyiam v PP* [1987] 2 MLJ 336 (distd)
PP v Alcontara [1993] 3 MLJ 568 (refd)
PP v Chua Chor Kian [1998] 1 MLJ 167 (refd)
PP v Manoharan a/l Ratnasamy [1989] 1 MLJ 504 (not folld)
PP v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560 (distd)
B *PP v Mohamed Halipah* [1982] 1 MLJ 155 (not folld)
Richardson v Bardenhagen Enterprise Pty Ltd [1971] Tas SR 307 (refd)
Shariff bin Kadir v PP [2003] 2 MLJ 203 (refd)

Legislation referred to
Dangerous Drugs Act 1952 ss 2, 12, 37(d), (da), 39A(2), 39B(1), 39B(1)(a), (b), (c)
C

Appeal from: Criminal Trial No 47–2 of 1992 (High Court, Johot Bahru)

Karpal Singh (Gobind Singh Deo with him) for the appellant.
Wong Chiang Kiat (Public Prosecutor, Attorney General's Chambers) for the respondent.
D

Gopal Sri Ram JCA (delivering judgment of the court):

E **[1]** The appellant was charged, tried and convicted of the offence of trafficking in a dangerous drug under s 39B(1) of the Dangerous Drugs Act 1952 ('the Act'). He has appealed to us. We heard the appeal on 7 August 2006 and reserved judgment until today. The facts are fairly straightforward.

F **[2]** According to the prosecution's case, on 8 September 1991 Chief Inspector Nordin bin Kadir (PW5) attended a briefing at which those present were informed that Detective Lance Corporal Chee Kar Wah (PW7) would act as an agent provocateur to buy some drugs. Later that day, five meetings took place between PW7 and the appellant. The first meeting was held at 8pm; the second meeting at about 8.15pm; the third meeting at about 9.10pm; the fourth meeting at about 10.25pm and the fifth and final meeting at 11.45pm. The first to the fourth meetings
G took place in the vicinity of Merlin Tower in Johor Baru. At the first meeting, PW7 was introduced to the appellant by an informer. At the second meeting, some preliminary negotiations took place for the sale of cannabis by the appellant to PW7. At the third meeting, an agreement was reached between the appellant and PW7 that the former would sell and the latter would purchase 4kg of cannabis for the sum of
H RM6,000. However, the appellant wanted PW7 to show him the RM6,000 before the drug could be delivered. The fourth meeting took place at 10.25pm. At that meeting, PW7 showed the appellant the RM6,000. At the same meeting, the place at which the drug was to be handed over was agreed upon. It was to be the railway crossing along Tun Abdul Razak, Johor Baru. The fifth meeting took place at the
I designated meeting point at about 11.45pm. This is what happened. PW7 saw the appellant coming along on foot. He was carrying a plastic bag. He went to a money changer's shop at which he placed the bag on the ground. He then went up to PW7 and asked him to go and pick up the bag. PW7 did so and returned to where the appellant was. PW7 then lit his cigarette lighter to check the contents of the bag. He found a substance which he suspected to be cannabis. Thereafter, PW7 lit his

cigarette lighter once again. This was the pre-arranged signal. Upon seeing this, the police officers who were in the ambush party at the scene came up to the appellant and arrested him. The drug was seized. Subsequent chemical analysis established it to be 3,686g of cannabis. For completeness, we must add that one other person was charged and tried with the appellant. He was acquitted and nothing turns on this as the prosecution has not appealed against that order.

[3] The learned trial judge found the appellant guilty on a joint application of the presumptions in s 37(d) and (da) of the Act. The criminal Bar refers to this as the rule against double presumptions. It is derived from the landmark decision of the Federal Court in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. A conviction for trafficking based on those two presumptions is bad and must be quashed. The learned deputy however argues that despite this misdirection by the trial court the conviction should nevertheless be upheld as there is sufficient evidence on record to establish a case of actual trafficking under section 39B(1)(a) of the Act. And it is this point that we really need to consider. For, if, as contended by the deputy there is overwhelming evidence to support the conviction then this Court may affirm the conviction despite the misdirection.

[4] Now, the prosecution's case, both in the court below and before us, is that the appellant sold the drug in question to PW7 and thereby trafficked in it. Trafficking is an offence created by s 39B(1)(a) of the Act. But there are other inchoate offences which are contained in sn 39B(1), which, for completeness says this:

> 39B. (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia —
>
> (a) traffic in a dangerous drug;
>
> (b) offer to traffic in a dangerous drug; or
>
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
>
> Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

[5] So, the crucial question in this case is whether on the facts there had been a sale of the proscribed drug by the appellant to PW7. To answer that question we must interpret the word 'selling' appearing in the definition of 'trafficking' in s 2 of the Act which provides:

> In this Act, unless the context otherwise requires —
>
> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

[6] Before we express our view on the matter, we must remind ourselves upon a matter of critical importance in relation to the interpretation of statutes. It is this.

A The word 'selling' which we must interpret appears in a penal statute. It must therefore be given a strict construction. There are several authorities that support this proposition but it suffices that we cite three. In *Liew Sai Wah v Public Prosecutor* [1968] 2 MLJ 1, Viscount Dilhorne quoted the following passage from *Halsbury's Laws of England* Vol 36 p 415 para 631:

B

> It is a general rule that penal enactments are to be construed strictly and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt.

C

[7] The next authority is *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337 where in the specific context of s 2 of the Act, Edgar Joseph Jr. FCJ said this:

> '…the drugs legislation is a piece of highly penal legislation and therefore any ambiguity in it should be resolved in favour of the subject…

D

[8] Lastly, in *Public Prosecutor v Chua Chor Kian* [1998] 1 MLJ 167 where Suriyadi J (as he then was) referred to *Maxwell on Interpretation of Statutes* (12th Ed) at p 239 which reads:

E

> The principle applied in construing a penal Act is that if, in construing the relevant provisions, 'there appears any reasonable doubt or ambiguity', it will be resolved in favour of the person who would be liable to the penalty. 'If there is a reasonable interpretation which will avoid the penalty in any particular case', said Lord Esher MR, 'we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections.

F

[9] Applying the approach of strict construction, we note that that s 2 of the Act does not employ the expressions 'agreement to sell' or 'agreement to buy' to fall within the definition of trafficking. Accordingly, in our judgment, a mere agreement to buy or sell a proscribed drug is not an act of trafficking within s 39B(1)(a) of the
G Act. Neither, we may add, do negotiations for a sale amount to the offence of trafficking within s 39B(1)(a). Whether they are caught by other provisions of the Act is a matter that must await decision in some future case.

[10] On the facts of the present case, it is our judgment, that to constitute the act
H of 'selling' within s 2 of the Act, there must have been an actual delivery of the drugs by the appellant accompanied by the physical handing over of the agreed price by the agent provocateur in exchange. In other words, the transaction must have been completed. Anything short of this is insufficient on the instant facts as it would admit a more lenient; a more flexible; approach to the construction of a penal statute.
I And that, on the authorities already discussed, is impermissible. Needless to say such a completed transaction did not take place in the present instance because the trap was sprung too early.

[11] We now turn to address the three authorities relied upon by the learned deputy in support of his argument. But before we do so, we must point out that all

three were decided before the Federal Court had handed down its judgment in *Muhammed bin Hassan v Public Prosecutor* and in *Chow Kok Keong v Public Prosecutor*. These two cases established several principles including (i) the need to apply a strict construction to the provisions of the Act; and (ii) the requirement to address the context in which the definition of trafficking in s 2 of the Act was sought to be applied.

[12] *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155 is the first case. There Yusof Rashid J said:

> It is common knowledge that the 'selling' and 'buying' transaction is complete when the parties to such sale have made an offer to sell a commodity at a certain price and the other has accepted such an offer at the said price. Thereafter it remains for the money to change hands which is not the vital part in the sale transaction for, a sale may yet be on complete credit.

[13] With respect, a 'buying' transaction is not complete when an offer is made and accepted. In such a case, all that has happened is that an agreement to sell has been concluded. And that is something that the Act does not encompass in the s 2 definition of trafficking. Further, the learned judge's approach appears to place on the words in s 2 a broad, flexible and liberal interpretation. This, of course, is not in accordance with settled principles of construction. Hence it is with utmost regret that we are unable to agree with the view expressed in the above-quoted passage, being, as we are, entirely conscious of the eminence of the learned judge who made that statement.

[14] The next authority is *Namasiyiam v Public Prosecutor* [1987] 2 MLJ 336. There, Syed Agil Barakbah SCJ said this:

> With regard to common ground (2), the trial judge in fact found each of the appellants guilty as charged under sn 39B(1)(c) of the Act and convicted them accordingly (see pp 209 and 312 of the Appeal Record). In his grounds of judgment in dealing with the defence evidence, the trial judge expressed the view that there was more than sufficient evidence to find the appellants guilty of trafficking in the said drugs even under sub-s 39B(1)(a) of the Act so as to invoke the presumptions under s 37(d) and (da) of the Act. We agree with him. That is because of the wide definition of trafficking in s 2 which includes inter alia the act of transporting, carrying, sending and delivering etc.

[15] Now, if you look carefully enough at the report of that case, you will find that the prosecution's case was not that there had been a sale. It was simply not a case under s 39B(1)(a). It was a case under s 39B(1)(c). Hence, any comment by the trial judge in that case about a case having been made out under the former subsection was pure obiter. Also, the Supreme Court does not appear to have addressed its mind to the principle that the Act had to be strictly construed. In any event, in the light of the later decisions of the apex court, the obiter dicta in Namasiyiam must be treated with extreme caution and as being wholly limited to the facts of that case.

[16] The third case is *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560. In that case, Chong Siew Fai CJ (Sabah & Sarawak) applied *Public Prosecutor v Mohamed Halipah* and said this:

> It is in evidence that on 31 July 1991 in the house No 129, there was discussion between the first respondent and PW9 about the supply of ganja, the first respondent told PW9 of the inadequacy of supply and that he (the first respondent) had only one kilogramme of ganja and the price was RM1,500. PW9 having agreed to the price, the first respondent directed the second respondent in Kedah dialect: 'Deris, pi siapkan barang'. The second respondent then went to room 'K' and took out the package of cannabis. All these constitute clear evidence of sale or supply within the definition of 'trafficking'. See *PP v Mohamed Halipah* [1982] 1 MLJ 155 where the charge was on sale of drugs; and apart from the admission in the cautioned statement, the material facts were, to a significant extent, similar. *PP v Tahir bin Kassim* [1985] 1 MLJ 381 was another case involving the element of negotiation for the sale of dangerous drugs. Mohd Dzaiddin J (as he then was) found that the defence had not, on the balance of probabilities, cast any doubt on the truth of the prosecution's case 'about the negotiation for the sale of drug by the accused…' See also *PP v Manoharan a/l Ratnasamy* [1989] 1 MLJ 504; *Teh Geok Hock v PP* [1989] 3 MLJ 162. All these cases, it must be noted, dealt with situations after the close of the defence's case.

[17] With respect, a careful reading of the judgment in that case shows that the prosecution's case there was one of supplying drugs and not selling them. So the observation about there having been a sale was pure obiter dicta. In any event, the approach to the construction of s 2 definition of trafficking appears to be broad, liberal and flexible: not strict. Lastly, the decision of the High Court at first instance in the case of *Public Prosecutor v Manoharan a/l Ratnasamy* [1989] 1 MLJ 504 (referred to by the learned Chief Judge) is plainly wrong as the definition of 'trafficking' in the Act does not include mere negotiations. What the High Court had done in that case was to have read words into the definition of trafficking in the Act. This is clearly impermissible. Thus, in *Richardson v Bardenhagen Enterprise Pty Ltd* [1971] Tas SR 307, Burbury CJ said:

> The dividing line between impermissible filling in of legislative gaps and spelling out by interpretation of a whole statute, something necessarily implied within its expressed language, is sometimes a fine one. Parliament may, of course, express its intention by necessary implication from the words it uses. This principle may often be called in aid where general statutory powers are given and to give effect to the clear legislative purpose incidental powers will be implied. It has been called in aid to introduce by implication the rules of natural justice where a tribunal is given statutory jurisdiction to determine rights. But what is implied must not conflict with the express language of the statute. It must be within it and incidental to it … *Particularly in a penal statute the distinction must steadily be borne in mind between something which is by implication part of what is expressed, and something which, by inference, the court concludes the legislature has simply failed to provide for or overlooked* … If, by permissible processes of statutory interpretation, *the court cannot* say that what is omitted is necessarily implied within the language it cannot *legislate by filling in gaps which the legislature has left. That proposition applied with particular force to penal statutes*. (Emphasis added.)

We would add that this passage was applied with approval by our Supreme Court in *Chiu Wing Na v Ong Beng Cheng* [1994] 1 MLJ 89 and by the Federal Court in *Public Prosecutor v Alcontara* [1993] 3 MLJ 568.

[18] This court has, acting on the strength of *Muhammed bin Hassan v Public Prosecutor* and *Chow Kok Keong v Public Prosecutor*, held on at least two occasions that facts that established mere negotiations did not constitute the offence of trafficking by sale within s 2 of the Act so as to come within s 39B(1)(a). These are *Asdanusi Daut v Public Prosecutor* [2004] 3 CLJ 669 and *Shariff Kadir v Public Prosecutor* [2003] 1 CLJ 863. Of these, the Public Prosecutor's further appeal to the Federal Court in the former case (*Asdanusi Daut*) was dismissed. Although no written judgment is available, it is quite clear that the apex court approved of our approach to the construction of s 2 of the Act.

[19] In the course of argument the learned deputy submitted that there was in fact a sale in this case. When we asked him when the sale had taken place, he said that it was at the fourth meeting. He was then asked: what if after the fourth meeting the appellant never showed up for the fifth meeting but was seen elsewhere with the bag in question, could he have been convicted for trafficking by sale? After careful reflection the learned deputy very fairly gave a negative response to our question. However, he then sought to argue that the sale had taken place at the fifth meeting but was unable to say why that was so apart from the fact that the drug had been delivered to PW7. But he had perforce to concede that no money had exchanged hands and hence there was no sale.

[20] Now, applying the law earlier discussed to the facts of the present case, we are satisfied that the evidence of the prosecution put at its highest merely established an agreement to sell the proscribed drug but not an actual selling of that drug. It follows from what we have said thus far that the conviction for trafficking cannot stand. However, there is abundant evidence that the appellant had actual possession of the proscribed drug. In these circumstances, we have no alternative but to quash the conviction under s 39B(1) and substitute it with a conviction under section 12 read with s 39A(2) of the Act. The sentence of death is set aside.

[21] Before we conclude there are two matters which we must mention. First, the eleventh hour submission by the learned deputy that even if the evidence did not establish 'selling' of the drug, there was sufficient evidence to convict the appellant under either s 39B(1)(b) or (c). He then invited us to affirm the conviction on that ground. We regret that we are unable to accept this invitation. The prosecution had fought its case throughout on the basis that there had been an actual sale. That is the case that the appellant had sought to meet by way of cross-examination, evidence and submissions. It would be an injustice for us now to permit the prosecution to change tack at this late hour and to mount a wholly different case altogether against the appellant.

[22] The other is a submission made by the appellant that the evidence of his conversations with PW7 was inadmissible because it had not been shown that PW7 was a police officer. Neither had PW7 taken down the statements made by the appellant at the meetings in question. In the light of what we have said earlier, we find it unnecessary to deal in any depth with this submission. But we must at once say in fairness to the prosecution that on the material before the trial court it had been proved beyond a reasonable doubt that PW7 was a police officer.

A **[23]** We will now hear arguments on sentence.

Conviction under s 39B(1) quashed and substituted with conviction under s 12 read with s 39A(2).

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Reported by Sally Kee

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